Supreme Court, U.S.
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No. 01-1666

IN THE

Supreme Court of the United States

GARY VICTOR DUBIN and GREGG YOUNG,
Petitioners,

v.

BANK OF HAWAII and JOHN CANDON,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT JOHN CANDON IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

DON JEFFREY GELBER*
GELBER, GELBER, INGERSOLL
& KLEVANSKY
Suite 1400 West Tower
745 Fort Street
Honolulu, Hawaii 96813
(808) 524-0155

Counsel for Respondent John Candon, individually and as Bankruptcy Trustee

*Counsel of Record

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED FOR REVIEW

Notwithstanding the lengthy list of questions set forth in the Petition for Writ of Certiorari, Respondent John Candon believes that the Petition raises, at most, three questions:

Whether, under the particular facts of this case, the District Court abused its discretion in awarding and determining the amount of sanctions against the Petitioners, pursuant to Fed. R. Civ. P. 11, arising from their filing of frivolous complaints.

Whether attorneys who file frivolous complaints against a bankruptcy trustee (in his fiduciary capacity and as an individual) for $70,000,000 plus punitive damages, and who have had a monetary sanction imposed against them by the District Court under Rule 11 because of the impropriety of the complaints and the improper motives with which the complaints were filed and prosecuted, may avoid paying for the cost of their improper conduct by asserting unsubstantiated charges of judicial bias and misconduct at every court level—the Magistrate Judge, the District Judge, and in the Ninth Circuit—and, in effect, shift that cost to the bankruptcy estate and its innocent creditors.

Whether attorneys who file such frivolous complaints, and who have had a monetary sanction imposed against them by the District Court under Rule 11 because of their improper conduct and motives, may avoid paying for the cost of their improper conduct by asserting, but failing to substantiate, that they are impecunious (although they have managed to post a supersedeas cash bond of $116,000.00).

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COUNTERSTATEMENT OF THE CASE

As much as Respondent John Candon (the "Trustee"), the bankruptcy trustee of Allan R. Kunimoto's bankruptcy estate, would like to believe that this case is one of "overwhelming national significance," as alleged by the Petitioners—and therefore requiring review by this Court—the truth is quite otherwise.

This case involves two lawyers (the Petitioners) who filed complaints on behalf of the debtor and his wife against the bankruptcy trustee (in his fiduciary and individual capacities), a former state court receiver, and Bank of Hawaii. Joint

Petition for Writ of Certiorari (the "Petition"), Appendix ("App.") 8, Exhibit "A," at A11-A32. As the District Court subsequently determined, and the Court of Appeals affirmed, the complaints were frivolous and filed for improper purposes. Petition, App. 11 at A62. Although Rule 11 of the Federal Rules of Civil Procedure permitted the Petitioners an opportunity to withdraw the complaints, they refused to do so, and responded by filing a barrage of papers in support of improper and frivolous complaints. The District Court ultimately dismissed the complaints, Petition, App. 9 at A33, and imposed sanctions under Rule 11. Petition, App. 11 at A62. During the course of District Court hearings, and the Ninth Circuit's review of the District Court's order and judgment imposing sanctions, the Petitioners attacked the integrity of almost every judge that had any involvement in the events leading up to the order and the judgment imposing sanctions, or its affirmation on appeal—including the state court judge who presided over state court litigation between the Bank and Dr. Kunimoto, the federal District Court judge who presided over Petitioner Dubin's criminal trial related to a tax crime,[1] the District Court judge who presided below, the magistrate judge appointed as special master to determine the amount of attorneys' fees incurred by the Bank and the Trustee in defense of the action improperly brought by the Petitioners, and, finally, one of the Ninth Circuit judges participating on the panel of that court. *See, inter alia*, Petition at 3, 7, 11-18; App. 19 at A185, *et seq.* (particularly Paragraphs 6, 7, 8, and 10), and App. 20 at A192.

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[1] The criminal conviction is unrelated to the matters before the Court except for the fact that Mr. Dubin contends that, when the Ninth Circuit affirmed the conviction, the judges on the panel became disqualified, presumably on the basis of bias, from hearing other matters involving Mr. Dubin, including his appeal in this case from the District Court to the Ninth Circuit.

Although the Petitioners have tried mightily to portray themselves as victims of judicial misconduct at every level, the main issue is, as the Ninth Circuit said, "whether the district judge abused his discretion in either the awarding of or [determining] the amount of Rule 11 sanctions" against the Petitioners for having filed and prosecuted (until the prosecution was terminated by an adverse judgment) frivolous complaints for improper purposes. Petition, App. 21 at A192. The Court of Appeals held that the District Court did not abuse its discretion and affirmed the District Court's judgment. *Id.* Commenting on the appointment of the special master and the evidentiary hearings held by the special master with respect to the determination of the amount of the attorneys' fees ultimately awarded as a sanction, the Court of Appeals said that the Petitioners had received "more process than what was required." *Id.*, App. 21 at A197. The same was true at every step of the proceedings.

Respondent Bank of Hawaii is also filing a Brief in Opposition to Petition for Writ of Certiorari (the "BOH Brief"). The Bank's brief contains a detailed statement of the proceedings below. To avoid repetition, the Trustee joins in the Bank's statement to the extent that it relates to the federal court proceedings. In doing so, however, we note that the Bank's statement discusses proceedings below involving the Bank's submission of redacted billing statements in support of an award of its attorneys' fees, and submission of unredacted billing statements to the magistrate judge (as special master) in chambers. *See* BOH Brief. The Petitioners claim that the Rule 11 sanction was unjustified, and "in violation of an attorney's due process rights," because of the *in camera* review and also because of "the amount [was] based on 'block billing' by opposing parties." Petition at 24. The record below demonstrates that (1) Respondent Candon's counsel did not submit redacted billings in support of an award of fees, (2) all such billing statements were filed as a matter of public record (both in the bankruptcy proceedings

and in the District Court proceedings), and (3) all statements contained an itemized breakdown for each task and did not contain "block billing" or "lumping." *See* Petition, App. 17 at A158; Excerpt of Record, Vol. 3 at 585 (in the Court of Appeals); Declaration of Counsel Respecting Time and Fees in Connection with Evidentiary Hearing on Rule 11 Sanctions (and Exhibit "A"), filed August 30, 1999 (in the District Court). The billing statements submitted by the Trustee's counsel were different than those submitted by the Bank's counsel in form, content, and amount. (By pointing out the difference in the billing statements submitted by the Bank's counsel and the Trustee's counsel, we in no way intend to imply that the Bank's billing statements were improper or that the magistrate judge's consideration of those billing statements, which contained confidential information unrelated to the request for the award of attorney's fees, was in any way improper. The Bank's circumstances and the Trustee's circumstances were different.)

MISSTATEMENTS OF FACT AND LAW IN THE PETITION

Except in capital cases, a respondent need not file a brief in opposition to a petition for writ of certiorari. Supreme Court Rule 15.1. Nonetheless, Rule 15.2 provides, in part, that:

> In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does

> not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition.

Pointing out each "perceived misstatement made in the petition" would rapidly exhaust the page limitation imposed on responses (as well as the patience of the Court). Respondent Candon and his counsel do not wish to avoid any obligation to the Court; nor do they intend to waive, and do not want to be deemed to have waived, any objection to the various arguments (factual and legal) presented by the Petitioners.

Accordingly, we call to the Court's attention:

1. The allegations of judicial misconduct, including corruption, bias, undue influence, senility, disqualification, etc. (Petition at 3, 7, 11-18, 19; App. 19 at A185, *et seq.* [particularly Paragraphs 6, 7, 8, and 10], and App. 20 at A192), are misrepresentations of fact and are not supported by the record. Petitioners' speculations, whether in the form declarations or otherwise, are not evidence of wrongdoing.

2. The Petitioners contend that they offered to dismiss the frivolously filed complaints without prejudice and that, therefore, they are entitled to the "safe harbor" protection of Federal Rule of Civil Procedure 11(c)(1)(a). Petition at 5-6. The Petitioners apparently contend that an offer to dismiss without prejudice is sufficient and that such an offer was made not only to the Bank but to Trustee Candon because the Petitioners also contend that "Ms. Leonard [the Bank's counsel] . . . acted as spokesperson for all defendants." *Id.* at 21. The Bank's counsel did not act as spokesperson for the Trustee; no offer to dismiss the complaint was made to Mr. Candon; and no offer to dismiss the frivolous complaints without prejudice (which means that the same complaints could be filed at a later date) would have been sufficient in any event.

3. The Petitioners' representations that the hearings before the magistrate judge, acting as special master to determine the amount of reasonable attorneys' fees, were "highly abbreviated" and the Petitioners had "little time" to present their case (Petition at 7) are false and a misstatement of the record. *See, inter alia*, Report of the Special Master, Petition, App. 17 at A158. As the Court of Appeals observed, "[t]he evidentiary hearings comprised more process than what was required." Petition, App. 21 at A197.

4. This case does not present a single issue of law (or a mixed question of fact and law) deserving of review.

a. The Petitioners asserted claims on the part of the Kunimotos which the Kunimotos did not own or have a right to assert. The bankruptcy estate, represented by the Trustee, had the exclusive right to assert all claims previously owned by the debtor or derivative of the debtor's claims.[2] *Sierra Switchboard Co. v. Westinghouse Electric Corp.*, 789 F.2d 705, 707-09 (9th Cir. 1986), *In re Van Dresser Corp.*, 128 F.3d 945, 947 (6th Cir. 1997); *In re Wischan*, 77 F.3d 875, 877 (5th Cir. 1996); *Vreugdenhil v. Hoekstra*, 773 F.2d 213, 215 (8th Cir. 1985); *Tignor v. Parkinson*, 729 F.2d 977, 981 (4th Cir. 1984). There is no circuit court case to the contrary. The District Court correctly determined that the complaints were frivolous and asserted for improper purposes and correctly imposed a sanction tailored to deter future misconduct and to remedy, in part, the harm caused.

b. The Petitioners claim that the District Court judge presiding over the case should have recused himself because one of the Petitioners (Mr. Dubin) alleges that he represented a client with a malpractice claim against the judge (or the judge's former law firm) when the judge was in private

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[2] In dismissing the complaints, the District Court also said that the "Defendants have raised numerous other valid grounds for dismissal." Petition, App. 9 at A38.

practice many years ago. Petition at 18-19. The Court of Appeals called the motion part of a "strategy of harassment." Id., App. 21 at A196. Judge Ezra had no recollection of the matter but referred the issue of possible disqualification to the chief judge. The chief judge assigned the matter to a senior judge, who concluded that Judge Ezra was not disqualified. *Id.*, App. 13, 14. Petitioner Dubin himself stated that he had "great doubts concerning [his former client's] credibility"; that there was "no suggestion here you [the Judge] ever committed malpractice"; that he held his former client "in very low regard"; and that his client "really didn't know what the truth was." *Id.*, App. 13 at 81, 83. The Court of Appeals was right.

c. The Petitioners claim that the District Court's order should be set aside because the magistrate judge improperly failed to consider their financial ability to pay the amount of fees awarded as a sanction. Petition at 26-29. This is an incorrect statement of the facts and the record. The magistrate judge did allow Petitioners to file declarations concerning their financial conditions, but he found that they had failed to demonstrate an inability to pay. Petition, App. 17 at A169. (The magistrate's conclusion is supported by the fact that, after the award of sanctions, Petitioner Dubin posted a supersedeas cash bond of $116,000.00. *See* Petition at 1.) As a logical matter, an attorney's poor financial condition cannot be a *shield* against Rule 11 sanctions. If that were the case, impecunious attorneys could violate the obligations of Rule 11 without fear of monetary sanctions. If the Petitioners' view were adopted, Rule 11, including the most obvious sanction, a monetary award to deter future misconduct and to make the wronged party whole, would be fully applicable to most attorneys, but trial courts would have to create non-monetary sanctions against impecunious lawyers who violate the Rule, and those sanctions, in any event, would not remedy, even in part, the harm caused to the wronged party. The Petitioners' contention that they should

be excused from paying for the harm caused by their improper conduct is not supported by the record, the law, or common sense.[3]

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

DON JEFFREY GELBER *
GELBER, GELBER, INGERSOLL
& KLEVANSKY
Suite 1400 West Tower
745 Fort Street
Honolulu, Hawaii 96813
(808) 524-0155

* Counsel of Record

Counsel for Respondent
John Candon, individually and
as Bankruptcy Trustee

[3] To the extent that misstatements of fact or law in the Petition are not mentioned above, but are set forth in the BOH Brief, the Trustee joins therein.